

PUBLIC HEALTH COUNCIL

Meeting of the Public Health Council, Tuesday, February 29, 2000, 10:00 A.M., Massachusetts Department of Public Health, 250 Washington Street, Floor 2, Boston, Massachusetts. Present were: Dr. Howard K. Koh (Chairman), Dr. Clifford Askinazi, Ms. Shane Kearney Masaschi, Mr. Benjamin Rubin, Mr. Albert Sherman, Ms. Janet Slemenda, and Dr. Thomas Sterne; Mr. Manthala George Jr. and Mr. Joseph Sneider absent. Also in attendance was Ms. Donna Levin, General Counsel.

Chairman Koh announced that notices of the meeting had been filed with the Secretary of the Commonwealth and the Executive Office of Administration and Finance, in accordance with Massachusetts General Laws, Chapter 30A, Section 11A 1/2.

The following members of the staff appeared before the Council to discuss and advise on matters pertaining to their particular interests: Dr. Paul Dreyer, Director, Division of Health Care Quality; Ms. Joyce James, Director, Determination of Need Program; and Attorney Kalina Vendetti, Deputy General Counsel, Office of the General Counsel.

RECORDS OF THE PUBLIC HEALTH COUNCIL MEETINGS OF OCTOBER 26, 1999 AND NOVEMBER 16, 1999:

Records of the Public Health Council meetings of October 26, 1999 and November 16, 1999 were presented to the Council. After consideration, upon motion made and duly seconded, it was voted (unanimously): That, records of the Public Health Council meetings of October 26, 1999 and November 16, 1999, copies of which had been sent to the Council Members for their prior consideration, be approved, in accordance with Massachusetts General Laws, Chapter 30A, Section 11A 1/2.

PERSONNEL ACTIONS:

In a letter dated February 14, 2000, Robert D. Wakefield, Executive Director, Lemuel Shattuck Hospital, recommended approval of the appointments and reappointments to the medical staff of Lemuel Shattuck Hospital, Jamaica Plain. Supporting documentation of the appointees' qualifications accompanied the recommendation. After consideration of the appointees' qualifications, upon motion made and duly seconded, it was voted (unanimously): That, in accordance with the recommendation of the Executive Director of Lemuel Shattuck Hospital, under the authority of the Massachusetts General Laws, Chapter 17, Section 6, the following appointments and reappointments to the medical staff of Lemuel Shattuck Hospital be approved:

<u>APPOINTMENTS</u>	<u>SPECIALTY/STATUS:</u>	<u>MEDICAL LICENSE NO.</u>
Ellen Christine Wallace, M.D.	Radiology, Consultant	76584
Nicolaos Athienties, M.D.	Nephrology	73425

<u>REAPPOINTMENTS</u>	<u>SPECIALTY/STATUS:</u>	<u>MEDICAL LICENSE NO.</u>
Garo A. Damla, M.D.	Gynecology/Consultant	77989
Farshid Fararooy, M.D.	Internal Medicine,Active	74864
Punyamurtla S. Kishore, M.D.	Internal Medicine/Active	43282

In a letter dated February 2, 2000, Katherine Domoto, M.D., MBA, Associate Executive Director for Medicine, Tewksbury Hospital recommended approval of the appointments to the provisional medical staff of Tewksbury Hospital, Tewksbury. Supporting documentation of the appointees' qualifications accompanied the recommendation. After consideration of the appointees' qualifications, upon motion made and duly seconded, it was voted (unanimously): That, in accordance with the recommendation of the Associate Executive Director for Medicine of Tewksbury Hospital, under the authority of the Massachusetts General Laws, Chapter 17, Section 6, the following appointments to the medical staff of Tewksbury Hospital be approved for a period of two years beginning February 1, 2000 to February 1, 2002:

<u>APPOINTMENTS</u>	<u>STATUS/SPECIALTY</u>	<u>MEDICAL LICENSE NO.</u>
Moinuddin Muttakin, M.D.	Provisional Affiliate/Psychiatry	53553
Benjamin Weinberg, M.D.	Provisional Affiliate/Internal Medicine	55744
Menekse Alpay, M.D.	Provisional Consultant/Psychiatry	156783
Ayse Atasoylu, M.D.	Provisional Consultant/Internal Medicine	161369
Anne Gurian, M.D.	Provisional/Active Psychiatry	71873

In a letter dated February 14, 2000, Blake Molleur, M.D., Executive Director, Western Massachusetts Hospital, Westfield, recommended approval of the reappointment of Ralph Kendall, M.D. to the consulting medical staff of Western Massachusetts Hospital. Supporting documentation of the appointee's qualifications accompanied the recommendation. After consideration of the appointee's qualifications, upon motion made and duly seconded, it was voted (unanimously): That, in accordance with the recommendation of the Executive Director of Western Massachusetts Hospital, under the

authority of the Massachusetts General Laws, Chapter 17, Section 6, the following reappointment be approved as follows:

<u>REAPPOINTMENT</u>	<u>STATUS/SPECIALTY</u>	<u>MEDICAL LICENSE NO.</u>
Ralph Kendall, M.D.	Consultant/Pulmonary	30632

MISCELLANEOUS:

**REQUEST FOR ADOPTION OF THE MAGISTRATE'S DECISION AS THE FINAL
DECISION OF THE DEPARTMENT IN THE MATTER OF THE DEPARTMENT OF
PUBLIC HEALTH V. DAVID MURPHY/ASHBURNHAM REST HOME, DOCKET NO.
PH-98-722:**

Attorney Kalina Vendetti, RN, Deputy General Counsel, Office of the General Counsel, presented the Matter of the Department of Public Health v. David Murphy/Ashburnham Rest Home to the Council. She said in part, "...This matter involves an action by the Department of Public Health ("Department") to revoke David Murphy's license to operate the Ashburnham Rest Home, a 17-bed facility in Ashburnham. The Department conducted an on site inspection of the Ashburnham Rest Home in January 1998. The inspection revealed numerous serious violations of the regulations which included failing to provide sufficient trained staff and professional consultants, failing to protect residents' property, failing to safeguard controlled drugs, failing to provide necessary supplies such as linens and blankets, and failing to keep the facility clean and safe. The Department ordered the licensee to correct the cited deficiencies by May 27, 1998, and notified him that failure to correct would constitute grounds for license revocation. On June 1, 1998 the Department conducted a re-inspection and determined that none of the violations had been corrected and that, in fact, there were even more deficiencies. Newly identified deficiencies included failing to provide an administrator for the facility, failing to provide adequate care to ill and/or medically fragile residents, failing to detect or treat residents' deteriorating medical conditions, failing to administer medications and treatments correctly, and failing to provide adequate food to meet the residents' minimum daily nutritional requirements."

Atty. Vendetti continued, "On June 27, 1998, the licensee filed a voluntary petition to re-organize the Ashburnham Rest Home business under Chapter 11 of the Bankruptcy Code. On September 9, 1998, the Bankruptcy Court ordered the bankruptcy case converted to Chapter 7 under the Bankruptcy Code, which required closure of the business. The bankruptcy trustee began to close the Ashburnham Rest Home, but quickly abandoned the property back to the licensee, who completed the closure. The last resident was transferred from the Ashburnham Rest Home on September 29, 1998. The Department initiated an agency action to revoke the license of David Murphy to operate the Ashburnham Rest Home on August 25, 1998. Mr. Murphy requested a hearing on the Department's action and the matter was brought to the Division of Administrative Law Appeals."

Further noted, Atty. Vendetti, "On April 2, 1999, the Department filed a motion for Summary Decision based on David Murphy's abandonment of his license to operate the Ashburnham Rest Home. This motion argued that, as a matter of law, Mr. Murphy's discontinuance of operation of the entire facility on September 29, 1998 should be treated as an abandonment of the license therefor. The motion argued that since Mr. Murphy had abandoned his license, there was no longer any license to revoke. The motion further argued that Mr. Murphy's claim for a hearing on the Department's action to revoke his license should be dismissed since he no longer had a license upon which to base his claim. Mr. Murphy did not file an opposition to the Department's motion. A hearing was held on July 12, 1999 but Mr. Murphy did not appear. On July 14, 1999 Chief Administrative Magistrate Connolly issued a Tentative Decision granting the Department's Motion and dismissed the entire matter pursuant to Adjudicatory Rule 1.01 (7)(h) and 105 CMR 153.028(G)."

The Magistrate's Tentative Decision states the following Findings of Fact:

1. Respondent operated a rest home at 97 Platts Road, Ashburnham, Massachusetts.
2. Respondent was licensed for 17 beds.
3. Respondent was cited for numerous deficiencies in January 1998 and in June 1998.
4. Respondent was unable to correct the deficiencies.
5. As a result of these deficiencies the residents of the respondent's rest home were transferred to other facilities.
6. The last resident was transferred on September 29, 1998.
7. The Petitioner performed a closure visit on October 19, 1998 at which time it obtained the respondent's license.

The Magistrate's conclusion states, "Pursuant to 105 CMR 153.028(G) discontinuance of operation of an entire facility for any period shall be treated as an abandonment of the license, except where the Commissioner has granted permission in advance. There is no evidence that the Commissioner gave such permission. Consequently, I conclude that the petitioner has abandoned his license. Since the Petitioner has abandoned his license he now is without a license and without a claim thereunder. It is therefore unnecessary for the Commissioner to revoke the license. Consequently, I recommend that this matter be dismissed."

After consideration, upon motion made and duly seconded, it was voted: (unanimously) to adopt the **Magistrate's Decision as the Final Decision of the Department in the Matter of the Department of Public Health v. David Murphy/Ashburnham Rest Home**, noted above.

**REQUEST FOR ADOPTION OF THE MAGISTRATE'S DECISION AS THE FINAL
DECISION OF THE DEPARTMENT IN THE MATTER OF THE DEPARTMENT OF
PUBLIC HEALTH V. DAVID MURPHY/MAGNOLIA REST HOME, DOCKET NO. PH
98-723:**

Attorney Kalina Vendetti, RN, Deputy General Counsel, Office of the General Counsel, presented the Matter of the Department of Public Health v. David Murphy/Magnolia Rest Home to the Council. She said in part, "...This matter involves an action by the Department of Public Health ("Department") to revoke David Murphy's license to operate the Magnolia Rest Home, a 16-bed facility in Fitchburg. The Department conducted an on site inspection of the Magnolia Rest Home in January 1998. The inspection revealed numerous serious violations of the regulations which included failing to provide sufficient trained staff and professional consultants, for instance, residents had not received necessary medications and treatments to prevent illness and injury, failing to protect residents' property, failing to safeguard controlled drugs, failing to provide necessary supplies such as linens and blankets, and failing to keep the facility clean and safe. The Department ordered the licensee to correct the most serious deficiencies immediately and to correct the other cited deficiencies by March 1, 1998, and notified him that failure to correct would constitute grounds for license revocation. On March 6, 1998, the Department conducted a re-inspection and determined that none of the violations had been corrected and that, in fact, there were even more deficiencies. Newly identified deficiencies included failing to provide an administrator for the facility, failing to provide adequate care to ill and/or medically fragile residents, failing to detect or treat residents' deteriorating medical conditions, failing to administer medications and treatments correctly, and failing to provide adequate food to meet the residents' minimum daily nutritional requirements."

Atty. Vendetti continued, "Another follow-up survey was conducted on May 28, 1998, but resident funds were still unaccounted for, medications were administered incorrectly, there was no registered nurse to provide consultation to staff and there was no administrator or dietician. Therapeutic diets were not available to residents who required them. Mental health services were not available to residents who required them. The facility submitted plans to correct the deficiencies cited and requested the Department to conduct a final re-survey before concluding its licensure action against the facility (which had been commenced on August 25, 1998). The Department conducted a re-survey in November 1998, but none of the deficiencies cited had been corrected."

Further, Atty. Vendetti noted, "In May, 1999, the licensee filed a voluntary petition to re-organize the Magnolia Rest Home business under Chapter 11 of the Bankruptcy Code. On or about May 17, 1999 the Bankruptcy Court ordered the licensee to transfer all of the residents out of the facility. The licensee began to close the Magnolia Rest Home and transfer all of the residents on May 18, 1999. The last resident was transferred from the Magnolia Rest Home on May 24, 1999. The Department initiated an agency action to revoke the license of David Murphy to operate the Magnolia Rest Home on August

25, 1998. Mr. Murphy requested a hearing on the Department's action and the matter was brought to the Division of Administrative Law Appeals. On June 7, 1999, the Department filed a motion for Summary Decision based on David Murphy's abandonment of his license to operate the Magnolia Rest Home. This motion argued that, as a matter of law, Mr. Murphy's discontinuance of operation of the entire facility on May 24, 1999 should be treated as an abandonment of the license therefor. The motion argued that since Mr. Murphy had abandoned his license, there was no longer any license to revoke. The motion argued further that Mr. Murphy's claim for a hearing on the Department's action to revoke his license should be dismissed since he no longer had a license upon which to base his claim. Mr. Murphy did not file an opposition to the Department's motion. A hearing was held on August 20, 1999, but Mr. Murphy did not appear. On September 8, 1999 Administrative Magistrate Kimberly Fletcher issued a Tentative Decision granting the Department's motion and dismissed the entire matter pursuant to Adjudicatory Rule 1.01(7)(h) and 105 CMR 153.028 (G)."

The Magistrate's Tentative Decision states the following Findings of Fact:

1. David Murphy was the licensee of the Magnolia Rest Home located at 159 Summer Street, Fitchburg, Massachusetts.
2. Magnolia Rest Home was licensed for 16 beds.
3. Respondent was cited for numerous deficiencies in 1998.
4. Respondent did not correct the numerous deficiencies.
5. As a result of these deficiencies, the Petitioner prohibited the Respondent from admitting new residents.
6. All residents were transferred from the facility by May 24, 1999.
7. The Petitioner performed a closure visit on May 24, 1999 at which time it obtained the Respondent's license.

The Magistrate's conclusion states, "Based on the submissions of the Petitioner, I conclude that there is no genuine issue of material fact in dispute and that the Petitioner is entitled to a summary decision. Pursuant to 105 CMR 153.028(G), discontinuance of operation of an entire facility for any period of time shall be treated as an abandonment of the license, except where the Commissioner has granted permission in advance. There is no evidence that the Commissioner gave such permission. Consequently, I conclude that the Respondent has abandoned his license. Since the Respondent has abandoned his license, he is now without a license and thus without a claim thereunder. It is therefore unnecessary for the Commissioner to revoke the license. Consequently, I recommend that the matter be dismissed.

After consideration, upon motion made and duly seconded, it was voted: (unanimously) to adopt the **Magistrate's Decision as the Final Decision of the Department in the Matter of the Department of Public Health v. David Murphy/Magnolia Rest Home**, noted above.

REGULATION:

REQUEST FOR FINAL PROMULGATION OF AMENDMENT TO DETERMINATION OF NEED REGULATIONS 105 CMR 100.000 GOVERNING APPLICATION FILING DATES FOR CONVALESCENT, NURSING AND REST HOME PROJECTS:

Ms. Joyce James, Director, Determination of Need Program, presented the request for final promulgation of regulations 105 CMR 100.000 governing application filing dates for convalescent, nursing and rest homes. Ms. James noted, "This amendment changes the next filing date of Determination of Need (DoN) applications for convalescent, nursing and rest home projects, subject to licensure by the Department pursuant to M.G.L.c.111,s.71, from May 1,2000 to May 1,2003, except for applications requesting new construction and renovation for facility replacement and modernization. A public hearing on the proposed amendment was held on January 31, 2000. No one attended the hearing. Written comments were received from the Massachusetts Extended Care Federation (MECF). The MECF requested that the moratorium of new nursing home beds be for two years instead of the proposed five years in order to allow a timely response by the Department if any acute shortages of nursing facility beds occur due to closures and bankruptcy. The November 16, 1999 memorandum to the Council proposed an extension of the filing date from May 1, 2000 to May 1, 2005, however, due to the comments by the MECF, the Department agrees that it may be prudent to reduce the moratorium period. However, staff believes that more than two years are required to allow sufficient time for the industry to adjust to these changes (bankruptcy and closures). Staff recommends extending the filing date from May 1, 2000 to May 1, 2003. Staff further noted that age-adjusted population projections show a statewide surplus of 4,139 Level II and Level III beds and that nursing homes are operating at an average occupancy rate of 92% instead of the Department's targeted goal of 96%. Further, the current regulations allow the filing of emergency applications."

After consideration, upon motion made and duly seconded, it was voted: (unanimously) to approve the **Request for Final Promulgation of Amendment to Determination of Need Regulations 105 CMR 100.000 Governing Application Filing Dates for Convalescent, Nursing and Rest Home Projects**; that a copy of this approved amendment be attached and made a part of this record as **Exhibit Number 14,671**; and that a copy be forwarded to the Secretary of the Commonwealth for promulgation.

INFORMATIONAL BRIEFINGS ON PROPOSED REGULATIONS:

Dr. Askinazi, Council member recused himself from participating in the discussions on docket items 5a (Informational Briefing on Amendment to Determination of Need Regulations 105 CMR 100.000 Governing Applications Eligible for Delegated Review and Action) and 5b (Informational Briefing on

proposed revisions to the September 1985 Chronic Disease Hospital Report and August 1992 Determination of Need Guidelines for Acute Inpatient Rehabilitation Services) to avoid any appearance of conflict of interest.

INFORMATIONAL BRIEFING ON AMENDMENT TO DETERMINATION OF NEED REGULATIONS 105 CMR 100.000 GOVERNING APPLICATIONS ELIGIBLE FOR DELEGATED REVIEW AND ACTION:

Ms. Joyce James, Director, Determination of Need Program, presented the informational briefing on a proposed amendment to the Determination of Need Regulations 105 CMR 100.000 governing applications eligible for Delegated Review and Action. This amendment would allow applications for chronic disease or acute inpatient rehabilitation services to be reviewed through the delegated review process. If adverse comments are filed or if the Commissioner of Public Health decides not to approve a project, the application will be presented to the Public Health Council pursuant to 105 CMR 100.510 of the DoN Regulations. Staff will return to the Council for final action on this proposed amendment in the near future.

NO VOTE/INFORMATION ONLY

INFORMATIONAL BRIEFING ON PROPOSED REVISIONS TO THE SEPTEMBER 1985 CHRONIC DISEASE HOSPITAL REPORT AND AUGUST 1992 DETERMINATION OF NEED GUIDELINES FOR ACUTE INPATIENT REHABILITATION SERVICES:

Ms. Joyce James, Director, Determination of Need Program, gave an informational briefing to the Council on Proposed Revisions to the Chronic Disease Hospital Report and the Determination of Need Guidelines for Acute Inpatient Rehabilitation Services. Ms. James noted, "...The revisions reflect policy changes in the health care requirements' sections of the Report and Guidelines. The revisions were developed with assistance from the Advisory Group on Chronic Disease and Acute Inpatient Rehabilitation Services convened by the Department on September 30, 1999."

Ms. James said further, "The absence of statewide need for additional chronic disease and acute inpatient rehabilitation beds and the unequal utilization of existing services make a strong case for reallocation of existing resources from areas of low to areas of high utilization. Currently, there is no mechanism for reallocating services, the Department has in the past developed a policy to allow growth in the system through the expansion of existing resources within a limited time or until the bed need formula has been reevaluated. Applied to the Chronic Disease Report and Rehabilitation Guidelines, this policy revises the health care requirements factor to allow addition of beds at existing facilities operating at capacity to meet patients' demand. This policy requires that addition of beds must occur at the main facility's site, determined to be the area of high utilization, and must be within existing space with costs for renovation below DoN expenditure minimums. Another policy implication is no transfer of site of beds within eighteen (18) months of adding beds under these revised guidelines. During this period, the Department expects to reevaluate the bed need formula for both services to determine if general need exists. A Determination of Need will be granted to applicants who meet the DoN

regulations as well as these revised guidelines. Applicants will file an abbreviated application to be defined by the Determination of Need Program. Following the public comment period, the revised guidelines will be presented to the Public Health Council for adoption.”

NO VOTE/INFORMATION ONLY

The meeting adjourned at 10:25 A.M.

LMH

Howard K. Koh, M.D., M.P.H.
Chairman

MINUTES OF THE PUBLIC HEALTH COUNCIL
MEETING OF FEBRUARY 29, 2000
MASSACHUSETTS DEPARTMENT OF PUBLIC HEALTH